Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center, a Pennsylvania Limited Partnership *and* Cynthia A. Clark *and* Erica J. Lewis *and* Melanie M. Fritz. Cases 6–CA–28609, 6–CA–28676, and 6–CA–28676–2

June 30, 2008

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 7, 1998, Administrative Law Judge Irwin H. Socoloff issued a decision in this proceeding. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

On October 30, 2000, the Board issued a decision reversing Judge Socoloff's findings that registered nurse managers, Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz, were statutory supervisors. See 332 NLRB 933 (2000). In doing so, the Board, citing *Providence Hospital*, 320 NLRB 717, 729 (1996), found that the nurse managers did not exercise independent judgment in directing aides because "[s]uch direction reflects nothing more than the exercise of the nurses' greater training, skill, and experience in helping less skilled employees perform their jobs correctly." 332 NLRB at 935. Having found that Clark, Lewis, and Fritz were not statutory employees, the Board further found that the Respondent violated the Act by threatening, disciplining, and discharging them because they engaged in protected concerted activities. Id. at 936.

The Respondent petitioned for review of the Board's decision to the United States Court of Appeals for the Third Circuit, and the Board filed a cross-application for enforcement. In January 2001, the Board filed in the Third Circuit an unopposed motion to hold the case in abeyance, pending a decision by the Supreme Court in *Kentucky River Community Care, Inc. v. NLRB*. On May 29, 2001, the Supreme Court issued its decision in that case, in which it rejected the rationale of *Providence Hospital*, supra, with respect to "independent judgment" as that term is used in Section 2(11) of the Act. See 532 U.S. 706 (2001).

After *Kentucky River* issued, the Board filed in the Third Circuit an unopposed motion to remand these proceedings. On October 30, 2001, the court granted the Board's motion and remanded the proceedings to the Board for further consideration. The Board notified all parties that it had accepted the court's remand and invited the parties to file statements of position as to the issues on remand, specifically whether nurse managers, Clark, Lewis, and Fritz, exercised independent judgment in assigning or responsibly directing subordinate employees. The Respondent and the General Counsel filed statements of position arguing, respectively, in favor of and against the nurses' supervisory status.

On September 29, 2006, the Board issued its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39, in light of the Supreme Court's decision in *Kentucky River*, supra. On September 30, 2006, the Board remanded the instant case to the chief administrative law judge (as Judge Socoloff had retired) for further consideration in light of *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest*. 348 NLRB No. 54 (2006). On remand, the case was assigned to Administrative Law Judge Arthur J. Amchan.

On April 16, 2007, Judge Amchan issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief and limited cross-exceptions.

The National Labor Relations Board[1] has considered the judge's decision and the record in light of the exceptions, cross-exceptions, and supporting briefs. For the reasons that follow, we adopt the judge's finding that nurse managers were not statutory supervisors because the Respondent failed to show, by a preponderance of the evidence, that these nurses exercised independent judgment while assigning or responsibly directing other employees. We deny the Respondent's remaining exceptions to the judge's decision, and we adopt the recommended Order as modified.[2]

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

ANALYSIS

I. INDEPENDENT JUDGMENT: ASSIGNING AND RESPONSIBLY DIRECTING

The judge found that the nurse managers did not exercise independent judgment in either assigning or responsibly directing employees. We agree.[3]

In *Oakwood Healthcare*, the Board found that a charge nurse exercised independent judgment when she made assignments based on her "analysis of an available nurse's skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient." 348 NLRB No. 37, slip op. at 11. The supporting evidence must be sufficient to establish that nurses "make assignments that are both tailored to patient conditions and needs and particular [employees'] skill sets." Id. at 12. Merely conclusory testimony that staffing needs are based on an assessment of "patient acuity" is insufficient to establish independent judgment. *Lynwood Manor*, 350 NLRB No. 44, slip op. at 2 (2007).

Here, Director of Nursing Carol Miller testified generally that nurse managers "determine the acuity level . . . of the residents on the floor" and reassign staff accordingly, such as by assigning more than one aide to a particular patient. As in *Lynwood Manor*, we find such testimony to be merely conclusory and hence insufficient to establish independent judgment. Moreover, there is no evidence that, in deciding which aides to assign, the nurse managers considered the particular aides' skill sets and matched those skills to the condition and needs of particular patients.

Neither has the Respondent demonstrated that nurse managers exercised independent judgment based on their alleged authority to release subordinates early in cases of illness or family emergency. In this regard, Miller testified in general terms that "[w]e have had cases" in which the Respondent's nurses released subordinates early under such circumstances. Miller could provide no examples, however, and as noted above, purely conclusory evidence is not sufficient to establish supervisory authority. See *Lynwood Manor*, supra; see also *Avante at Wilson, Inc.*, 348 NLRB No. 71, slip op. at 2 (2006) (finding insufficient to establish supervisory authority manager's testimony that she was "familiar with [staff nurses] sending [a CNA] home") (alterations in original); *Golden Crest*, supra, slip op. at 5. Moreover, the Board has found that a putative supervisor does not exercise independent judgment merely by permitting a sick employee to leave work early. *Sam's Club*, 349 NLRB No. 94, slip op. at 8 (2007); *Shaw, Inc.*, 350 NLRB No. 37, slip op. at 4 (2007) (finding authority to allow employees to leave work shortly before the end of their workday insufficient to show independent judgment).

In sum, the Respondent's evidence was insufficient to demonstrate that nurse managers exercised independent judgment when assigning or responsibly directing other employees.[4]

II. RESPONDENT'S REMAINING EXCEPTIONS

A. Nurse Managers' Job Description

The Respondent contends that language in the nurse managers' job descriptions and in its operational policies demonstrates supervisory authority. The Board has held, however, that employer-prepared job descriptions are not controlling; what matters are the authority that an individual actually possesses and the work that the individual actually performs. *Oakwood Healthcare*, supra, slip op. at 5 fn. 24. As demonstrated above, the nurse managers' actual duties and authorities do not show supervisory status, and a job description alone is insufficient to carry the respondent's burden.

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[3] Because we find that the nurse managers were not supervisors based on the Respondent's failure to show the exercise of independent judgment, we find it unnecessary to pass on the judge's findings that the nurse managers did not possess the authority to assign, but did possess the authority to responsibly direct, other employees. We nevertheless modify several of the judge's statements regarding applicable standards under *Oakwood* for establishing responsible direction. In finding that the nurse managers possessed the authority to responsibly direct aides, the judge drew an "inference" that, if an aide failed to perform a task as directed by a nurse manager, the nurse manager would have suffered an adverse personnel action. The judge's reliance on such an "inference" rather than on record evidence conflicts with the Board's mandate in *Oakwood,* supra, that

> to establish accountability for the purposes of responsible direction, *it must be shown* that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. *It must also be shown* that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id., slip op. at 7 (emphasis added).

In addition, the judge stated that accountability means that "some adverse consequence *must befall* the one providing the oversight if the task performed by the employee is not performed properly" [emphasis added]. As the passage above from *Oakwood* states, however, accountability requires only the "prospect" of adverse action. Thus, the judge incorrectly stated that such adverse action is necessary to finding supervisory status.

[4] In reaching this conclusion, we do not rely on the judge's statement that nurse managers do not exercise independent judgment because they "assign and direct aides to perform tasks that are routinely and necessarily performed in any nursing home." In this connection, it appears that the judge was using the terms "routinely and necessarily" to refer to any tasks that are regularly assigned or performed in nursing homes. The fact that a task is regularly assigned or performed does not preclude the possibility that such regular assignments require the exercise of independent judgment.

B. Highest-Ranking Employees on Duty

The Respondent argues that the nurse managers were supervisors because they were the highest-ranking employees on duty at the nursing home from 14 to 16 hours a day. We reject this argument.

Certain judicial authority cited by the Respondent notwithstanding,[5] the Board has continued to hold that an employee's service as the highest-ranking employee on duty is a secondary indicium of supervisory status that, by itself, is insufficient to demonstrate supervisory status. See, e.g., *Golden Crest*, 348 NLRB No. 39, slip op. at 4 fn. 10. Other courts of appeals have approved the Board's holding in this regard.[6] See *Jochims v. NLRB*, 480 F.3d 1161, 1165, 1173–1174 (D.C. Cir. 2007) (finding individual's status as "weekend supervisor" and "the highest ranking employee at the facility on the weekend" an insufficient basis for finding supervisory status); *NLRB v. Olney IGA Foodliner*, 870 F.2d 1279, 1283 (7th Cir. 1989) ("Occasionally working as the highest ranking employee, even if regularly scheduled to do so, is not determinative."); *NLRB v. McCullough Environmental Services,* 5 F.3d 923, 941 fn. 28 (5th Cir. 1993) (holding that "lack of supervision, by itself, is insufficient to confer supervisory status," although "it is indicative of supervisory status"). Further, the fact that nurse managers could call Miller 24 hours a day, 7 days a week undercuts the Respondent's reliance on the nurses' supervisory status as highest-ranking employees on duty. See *Golden Crest*, supra, slip op. at 4 fn. 10 (finding that service as highest-ranking employee on duty was "even less probative where management is available after hours"). Thus, we deny this exception.

C. Evidentiary Standard

The Respondent argues that the judge found that nurse managers were not supervisors by applying an incorrect evidentiary standard. Specifically, the Respondent claims that the nurse managers' written job descriptions and Miller's testimony were sufficient to establish a "prima facie" case of supervisory status, and that the burden then shifted to the General Counsel to produce affirmative evidence that the nurse managers were not supervisors. The Board has never held, however, that the burden of going forward with evidence of supervisory status ever shifts to the nonasserting party. Rather, the party that asserts supervisory status retains the burden of proving that status by a preponderance of the evidence. See, e.g., *Croft Metals*, supra, 348 NLRB No. 38, slip op. at 5. For the reasons stated by the judge as modified herein, the Respondent has failed to sustain that burden.

D. Authority to Discipline

Finally, the Respondent argues that nurse managers are supervisors based on their alleged authority to discipline other employees. For the reasons stated by the judge, we deny this exception. First, the Board's remand order did not encompass this issue. Moreover, the Respondent's evidence showed mere "paper authority" to discipline, not actual authority as required to establish supervisory status. *Golden Crest*, slip op. at 5*; Training School of Vineland,* 332 NLRB 1412, 1416, 1417 (2000).

In sum, we find no merit in the Respondent's exceptions, and we adopt the judge's decision as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Loyalhanna Health Care Associates, t/d/b/a Loyalhanna Health Care Center, Latrobe, Pennsylvania, its officers, agents, successors and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs accordingly.

"(a) Within 14 days from the date of this Order, offer Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz whole for any loss of earnings or other benefits suffered as a result of the discrimination against them. Backpay shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

2. Substitute the following for paragraph 2(c).

"Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

[5] See *Kentucky River Community Care, Inc. v. NLRB*, 193 F.3d 444 (6th Cir. 1999) (relying, among other factors, on registered nurses' status as highest-ranking employees on duty in finding that nurses were supervisors), affd. 532 U.S. 706 (2001); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998) (same). We note that, in affirming the Sixth Circuit's decision in *Kentucky River*, the Supreme Court did not give any indication that it was agreeing with this aspect of the Sixth Circuit's decision.

[6] There is no Third Circuit precedent on this point.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with the loss of their nursing licenses for engaging in protected concerted activities.

WE WILL NOT warn or otherwise discipline employees for engaging in protected concerted activities.

WE WILL NOT discharge employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warnings issued to Erica J. Lewis and Melanie M. Fritz, and to the unlawful discharges of Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary warnings and discharges will not be used against them in any way.

LOYALHANNA HEALTH CARE ASSOCIATES, T/D/B/A LOYALHANNA CARE CENTER

David L. Shepley and *Joann F. Dempler, Esqs.,* for the General Counsel.

Michael E. Flaherty and *Robert J. Cromer, Esqs. (Karlowitz, Cromer & Flaherty, P.C),* of Pittsburgh, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION ON REMAND

ARTHUR J. AMCHAN, Administrative Law Judge. This case is before me pursuant to the Board's Order of September 30, 2006, remanding this matter for further consideration in light of the decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37; *Golden Crest Healthcare Center*, 348 NLRB No. 39; and *Croft Metals, Inc.*, 348 NLRB No. 38. The Board issued these decisions on September 29, 2006, addressing the issues of what "assign," "responsibility to direct" and "independent judgment" mean as used in the definition of "supervisor" in Section 2(11) of the Act. The parties have been accorded the opportunity to reopen the record, which they have declined, and to file briefs on the issues raised in the above-cited cases. Both the General Counsel and Respondent filed briefs regarding the remanded issues.

Procedural History and Chronology

November 19, 1996–January 3, 1997: Original charges filed.

February 28, 1997: The General Counsel issues his complaint.

May 14, 1997: evidentiary hearing before NLRB Administrative Law Judge Irwin Socoloff.

April 7, 1998: Judge Socoloff's decision dismissing the complaint on the grounds that the three charging parties were "supervisors" pursuant to Section 2(11) of the Act.

October 30, 2000: NLRB decision (332 NLRB 933) reversing Judge Socoloff on the supervisory issue and ordering Respondent, Loyalhanna Care Center, to offer the three charging parties reinstatement and compensation for any loss of earnings or other benefits resulting from Respondent's violations of Section 8(a)(1).

October 30, 2001: The United States Court of Appeals for the Third Circuit granted the Board's motion to remand this case for reconsideration in light of the decision of the United States Supreme Court in *Kentucky River Community Health Care v. NLRB*, 532 U.S. 706 (2001).

September 29, 2006: Board decision in *Oakwood Healthcare*, etc.

September 30, 2006: Board order remanding this case.

February 26, 2007: Assignment to this judge.

February 27, 2007: Order requiring briefs no later than April 6, 2007.

Decision on the Merits

The remand order does not authorize this judge to evaluate this case on the merits. Thus, I am bound by the factual findings and conclusions of Judge Socoloff and the Board's 2000 decision. To briefly summarize, the factual context of this case is as follows:

The charging parties were at all material times, registered nurses (RNs) at Respondent's nursing home in Latrobe, Pennsylvania. Their titles were "nurse/manager." On September 25, 1996, one of the Charging Parties, Cynthia Clark, complained to Assistant Director of Nursing (ADON) Jacqueline Gaydar about being scheduled for work on a Saturday. When Gaydar showed Clark that she had agreed to this assignment, Clark apologized. As the conversation continued, Clark and another of the Charging Parties, RN Melanie Fritz, complained to Gaydar about wages at Respondent's facility, staffing levels, and other working conditions. Charging Party Erica Lewis was present during this discussion.

The next day, Carol Miller, the director of nursing (DON) fired Clark and disciplined Fritz for being disrespectful towards Gaydar, an allegation which they denied. Gaydar did not testify before Judge Socoloff. Thus, he credited the only firsthand accounts of the September 25 meeting, i.e., that of the charging parties.

Fritz and Lewis testified on Clark's behalf at an unemployment insurance hearing on November 8, 1996. Respondent disciplined them both immediately afterwards for what Judge Socoloff found were discriminatory reasons. Fritz and Lewis gave Respondent 2-week resignation notices on November 11. Respondent discharged Fritz and Lewis almost immediately. Judge Socoloff and the Board found these actions to be discriminatory, as well as Respondent's discharge of Clark and the disciplinary notices issued to all three nurses.

Judge Socoloff's Decision and the Board's Reversal of That Decision

Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." An individual who is a "supervisor" pursuant to Section 2(11) is excluded from the definition of "employee" in Section 2(3) of the Act and therefore does not have the rights accorded to employees by Section 7 of the Act.

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in Section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor.

Judge Socoloff found that all three charging parties were supervisors on the grounds that they responsibly assigned and directed Respondent's nurses' aides, called aides in for work and allowed them to take time off. The Board reversed the judge, relying at least in part on its decision in *Providence Hospital*, 320 NLRB 717, 720 (1996). In *Providence Hospital*, the Board stated that "Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training or position. . . ." The *Providence Hospital* rationale was explicitly rejected by the U.S. Supreme Court in *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1868 fn. 1 (2001).

The Board also concluded that the charging parties did not have to use independent judgment in calling employees in for work, releasing employees from work early, requiring them to stay at work beyond the end of their shift, or in assigning work to the aides, *Loyalhanna Care Center,* 332 NLRB 933, 935–936 (2000).

Facts Bearing on Whether or Not the Charging Parties Were "Supervisors" Pursuant to Section 2(11) of the Act

In the fall of 1996/spring of 1997, Respondent operated a 116–120 bed facility. This included a unit for skilled nursing care, rehabilitation nursing services, respite care and an Alzheimer unit. Loyalhanna employed about 120 individuals, including about 20 registered nurses (RNs), 8 licensed practical nurses (LPNs) and 45–50 certified and uncertified nursing assistants. Overseeing the nursing staff were three individuals, who all parties deemed to be statutory supervisors, DON Carol Miller; ADON Jacqueline Gaydar, and Resident Care Coordinator Jeanette Ream.

Residents needing more skilled nursing care lived in the North wing of the building; those needing less skilled care were quartered in the South wing. In May 1997, there were about 55 residents living in each wing. The North wing was generally staffed by RNs working with nurses' aides; the South wing was generally staffed by LPNs working with nurses' aides. The North wing had two hallways or corridors; generally one RN serviced one corridor and another serviced the second. Both staff RNs and staff LPNs held the title of "nurse/manager."

Nurses were assigned to four shifts: 7–3:30 p.m.; a floating shift 8–4; a 3–11:30 p.m. shift, and an 11 p.m. to 7:30 a.m. shift. By state law, a RN must be at the facility at all times.

Direction of Lower Rank Employees

The job description signed by each of the charging parties' states that part of their main duties and responsibilities is to review and interpret work performance against accepted standards (R. Exh. 2). The job description does not indicate whose work performance is to be reviewed and interpreted and there is no evidence that this sentence in the job description was ever explained to the charging parties. However, DON Miller testified that it means that the RNs are responsible for making sure that the care rendered by the aides, LPNs and other employees are delivered in a safe and efficient way. In Clark's April 1996 performance review, one of her major strengths was described as the fact that she is "confident and can take charge of subordinates."

A job description for a nurse's aide, signed in July 1995 by Charging Party Clark, states that an aide is to "perform assigned duties at the direction and under the supervision of the

Nurse Manager." It also more specifically states that a nurse's aide "performs nursing procedures as directed by the nurse manager, i.e., specimen collection, intake and output observation and recording, bladder and bowel training, vital signs, weight, etc."

The charging parties were responsible for assuring that the aides had the side rails up on the residents' beds and that the aides made sure that each resident had easy access to a call button.

Discipline of Other Employees

The charging parties' job descriptions also state that they have the ability to reprimand and/or discipline personnel. The record, however, contains no evidence that any of the charging parties ever did more than record the facts of alleged misconduct by other employees on Respondent's employee warning report form. They neither administered discipline nor recommended whether and/or to what extent any other employee should be disciplined. While DON Miller testified that she generally follows the RN/nurse manager's recommendations regarding discipline, she gave no specific examples as to when she had done so. Indeed, Miller's very generalized testimony indicates that in administering discipline she gives considerable weight to factors other than a nurse manager's recommendation. She also testified that the LPNs have the same disciplinary authority as RNs.

The only evidence in this record of an RN administering discipline is Miller's testimony that at some unspecified time in the past she, as an RN/nurse manager, had sent an LPN home and called in a replacement because the LPN had left Respondent's facility during her shift to eat. She apparently did so without checking first with higher authority. Respondent's employee handbook states that "leaving the premises during working hours" is unacceptable conduct for which an employee may be disciplined. There is no evidence in this record as to whether the offending LPN was paid for the hours after Miller sent her home or whether or not she was disciplined in any other manner. There is also no evidence as to whether Miller was authorized to take such action.

Assignment of Other Employees

Jennifer Ream, Respondent's resident care coordinator, assigned both nurses and aides to the dates, the shifts, and the wings on which they would work. The nurse managers could allocate work loads for an aide in situations such as one in which fewer aides showed up for work than were scheduled. Also, if an LPN called in to say he or she was not coming to work, a RN/nurse manager would go to a telephone list to procure a replacement. However, if the replacement employee would be working overtime, the nurse manager was required to get approval from higher management.

Ream also assigned break periods to LPNs and aides. A RN/nurse manager could alter this schedule if necessary due to emergencies or the volume of work. On the night shift and most of the 3–11 shift, when neither Miller, Gaydar, nor Ream were at the facility, the RNs were the highest ranking individuals present at Respondent's nursing home.[1]

Judge Socoloff found that, "the registered nurses can, in the exercise of their discretion, permit early dismissal of other employees, for example, in the case of illness or family emergency." The Board did not disturb this finding in its 2000 decision. However, I note that the evidence of record on this point, appears, as argued by the General Counsel at page 14 of his brief, to consist of "purely conclusory evidence," which the Board found in *Golden Crest* to be insufficient to establish supervisory status, slip op. at p. 5.

At transcript page 143, Respondent's counsel elicited the following testimony from DON Miller:

> Q. Do RNs have the authority to permit early dismissal of subordinates? I am talking about LPNs and nurse's aides?
>
> A. Yes, they do.
>
> Q. For what reason?
>
> A. Frequently, if they—another employee becomes ill on their shift, the RNs are the ones that have the ultimate say if it's an on shift to release them to go ahead and go home. We have had cases where families have called in, there is a family emergency at home, the RNs have released that person from work at that point in time.

Miller gave no specific examples as to when this occurred and there are no provisions either in Respondent's employee handbook or in the nurse manager's job description that gives nurse managers such authority. There is also no evidence that any of the charging parties were told that they had authority to excuse an employee before or during a shift without seeking approval from Miller, Gaydar, or Ream. Moreover, Respondent's employee handbook (GC Exh. 2 at p. 5) suggests that it is each employee's responsibility to find a suitable replacement if they are not able to work their assigned shift.

The nurse managers would on occasion direct an aide to answer a resident's call button and remind them to be certain that a resident's side rails were raised. Aides were to notify the nurse manager if a resident had a temperature in excess of 99 degrees. Nurse managers could assign an aide to do a task, such as bathing a resident, in place of the aide assigned to a resident, if the assigned aide could not perform the task.[2]

While discussing workloads on September 25, 1996, ADON Gaydar informed Charging Parties Clark and Fritz that if they needed help in the North wing, they could require an LPN from the South wing to assist them and that it was their duty to do so. Clark and Fritz responded that the LPNs in the South wing simply ignored their requests for assistance due to their own workload.

[1] Nothing in the statutory definition of "supervisor" suggests that service as the highest ranking employee on site requires finding that such an employee must be a statutory supervisor, *Training School at Vineland,* 332 NLRB 1412 (2000).

[2] There is no evidence that this ever happened. This finding is predicated on Erica Lewis' answer to a hypothetical question from Respondent's counsel.

Application of the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* Decisions to the Facts of This Case

In *Oakwood Healthcare*, slip op. at p. 9, the Board reaffirmed the principle that the "burden of proving supervisory status rests on the party asserting that such status exists." Respondent has failed to meet its burden of proof in this case.

Responsibility to Direct

The Board in *Oakwood Healthcare* stated that to meet the criteria for "supervisor' based on the ability to responsibly direct employees, an individual must be accountable for the performance of the task by the other person, such that some adverse consequence must befall the one providing the oversight if the task performed by the employee is not performed properly. The fact that Charging Party Clark was rated on her ability to "take charge of subordinates" in her 1996 performance review does not establish that she or any other nurse manager was a supervisor. In order to establish her supervisory status on this basis, Respondent would also have to establish that some adverse consequence could befall a nurse manager from a poor rating in this respect, or that a positive consequence of favorable rating would result, *Golden Crest Healthcare Center*, slip op. at p. 5.

Focusing solely on the accountability factor, there is no direct evidence that any RN/nurse manager was disciplined by Respondent because a nurse's aide did not perform a task. However, it is almost axiomatic that if an aide doesn't answer a call button, bathe a patient, etc., the nurse on that corridor is going to be held accountable—unless the nurse gets somebody else to perform the task in a timely fashion.

The Board in *Oakwood* also stated that, "the concept of accountability creates a clear distinction between those employees whose interests, in directing other employees' tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task." This test is extremely difficult to apply in the abstract. In directing an aide to answer a call button, the nurse obviously is mainly concerned with the completion of the task, but is also acting in the interests of management, who would dearly like to avoid getting complaints from the resident's family.

In *Oakwood* and *Golden Crest*, the Board found that the employer had not demonstrated that its charge nurses were held accountable for the job performance of others, i.e., no evidence that charge nurses must take corrective action if other staff members fail to complete a task and no evidence that that charge nurses are subject to discipline if other staff members fail to perform specific tasks. Particularly in the nursing home context, where RNs and LPNs typically work in conjunction with nurses' aides, it is hard to imagine a situation in which competent counsel, after reading these opinions, would be unable to establish that any RN or LPN in a nursing home had the ability to responsibly direct the aides working with them.

Employer's counsel, wishing to establish supervisory status, will certainly not elicit the kind of testimony counsel elicited in *Golden Crest,* i.e., that the ADON instructed nurses that they are not allowed, under any circumstances, to send aides home early, that the ADON reprimanded a nurse who sent an intoxicated aide home or that RNs were prohibited from requiring LPNs or aides to help them under any circumstances. In fact, one can rest assured that competent counsel will be able to elicit testimony to the contrary.

If a resident was to fall out of bed because an aide failed to raise the guardrails and the resident's family complains to the nursing home or threatens to file a lawsuit, it is highly unlikely that the RN or LPN responsible for the resident will be able to avoid responsibility by blaming the aide. Any competent attorney representing a nursing home should be able to elicit testimony from its witnesses that adverse consequences would befall an RN or LPN in such a situation. I conclude that the Charging Parties Clark, Fritz, and Lewis had the ability to responsibly direct the nurses' aides who worked in their wing of Respondent's nursing home. I do so because I draw an inference that had an aide failed to raise a patient's bedrails, as directed by one of the charging parties, that RN/nurse manager may have suffered an adverse personnel action. The next issue to consider is whether they had to exercise independent judgment in doing so.

Independent Judgment

The Board in *Oakwood*, citing the Supreme Court decision in *Kentucky River*, stated that it must assess the degree of discretion exercised by a individual in determining whether they fall into the Section 2(11) category of "supervisor." The Board stated the individual's judgment must involve a degree of discretion that rises above the "routine or clerical." In order to be a statutory supervisor, an employee must make decisions that are more than "routine or clerical" with regard to one or more of the statutory indicia of supervisory status. These indicia concern an individual's relationship to employees; not to patients, residents, customers, or clients. Thus, a RN's decision to call a physician because of a resident's condition, even though it may be more than routine, has nothing to do with the issue of whether or not that nurse is, or is not, a 2(11) supervisor.[3]

In the *Oakwood* decision, at slip op. at pp. 8–9, the Board stated that, "if there is only one obvious and self-evident choice," an individual is not exercising the degree of discretion that qualifies one as a "supervisor." The Board gave an example of such a routine or clerical decision: one in which a charge nurse assigns the one available nurse fluent in American sign language (ASL) to a patient dependent on ASL. At page 11, the Board describes the assignment of a nurse who is particularly good at peritoneal dialysis to a patient who requires such treatment as an example of a nonroutine or nonclerical decision. It seems to me that both decisions are obvious and self-evident. In these situations, any rational person would assign the nurse with special expertise to the patient needing their expertise—unless there was some other countervailing consideration. In any health care context, an RN might, for example, decide to assign a Spanish-speaking employee to assist in the care of a Spanish-speaking patient. If such a decision is not deemed "routine or clerical," virtually every RN or LPN, and

[3] R. Br. at p. 5 recognizes this principle. However, at p. 7, Respondent relies on a nurse's authority to decide whether to summon a physician or send a patient to the hospital, in support of its argument that the charging parties were supervisors.

most certainly those working in nursing homes fall within the definition of "supervisor" in Section 2(11).

The record herein does not reflect sufficient discretion on the part of RNs who were "nurse managers" in assigning and directing LPNs and/or aides to establish their supervisory status. What the record shows is that "nurse managers" assign and direct aides to perform tasks that are routinely and necessarily performed in any nursing home. Moreover, the record fails to indicate any significant degree of discretion in the nurse manager's selection of an aide to perform a task or in the instructions given by the nurse to the aide as to how to perform any particular task.

To the extent the RN nurse managers reassigned aides during a shift, the record establishes only that they did so solely on the basis of the quantity of work. Such determinations do not involve the exercise of independent judgment, *Oakwood Healthcare*, slip op. at p. 12.

Similarly, assuming that this record supports a finding that the charging parties had such authority, their ability to allow employees to leave early in the event of illness or a family crisis does not require the exercise of sufficient independent judgment to make them "supervisors," *K.W. Electric, Inc.*, 342 NLRB, 1231, 1235–1236 (2004); *Eventide South*, 239 NLRB 287, 288 (1989); *Jochims v. NLRB*, No. 05-1455, 2007 WL 860854 (D.C. Cir. 2007) reversing *Wilshire at Lakewood,* 345 NLRB 1050 (2005).

While it is true that the nurse/managers do not recommend how an aide, LPN, or even another RN should be disciplined, the decision as to whether to inform higher level management as to another individual's misconduct, may require a bit of discretion. Nevertheless, Board law is quite clear unless the putative supervisor's actions result in an adverse personnel action without independent investigation or review by other supervisors, his or her recommendation or report is insufficient grounds on which to find supervisory status, *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Jochims v. NLRB*, supra.

Assign[4]

In *Oakwood Healthcare,* the Board stated that to meet the criteria for "supervisor' based on an individual's authority to "assign" other employees, an individual must designate the overall duties of an employee, not simply give ad hoc instructions to an employee to perform a discrete task. On this record, it is clear that the charging parties are not "supervisors" due to their ability to assign other employees. To the extent that they did anything other than assign nurse's aides discrete tasks, they did not exercise independent judgment. To the extent that they called employees in to replace absentees, their function was routine or clerical. To the extent they allowed sick employees or those with family emergencies to leave work early, the nurse manager was simply selecting an obvious or self-evident course of action.

Like the employer in *Golden Crest Healthcare Center*, Respondent herein has failed to establish that the nurse managers have the ability to require that an off-duty RN, aide or LPN come into work to replace another employee who failed to show up. There is no evidence that an aide, for example, has ever been disciplined for refusing a nurse manager's "request or order" that they come into work when not scheduled. Likewise, the nurse manager's "authority" to require LPNs in the South wing was nominal, rather than genuine authority. This is established by the fact that LPNs felt free to ignore such requests/orders without any adverse consequences.

Authority to Discipline Employees

The Board's remand order did not encompass consideration of whether or not the charging parties were supervisors on the basis of their alleged authority to discipline employees. However, Respondent at page 8 of its statement of position (or brief), appears to continue to rely on this alleged authority to establish the supervisory status of the RN/nurse managers.

Although the charging parties' job descriptions stated that they had the ability to reprimand and/or discipline personnel, Respondent has not established that they were supervisors on this basis. The Board insists on evidence supporting a finding of actual authority, as opposed to mere paper authority, *Golden Crest*, slip op. at p. 5; *Training School at Vineland*, 332 NLRB 1412, 1416 (2000). DON Miller's testimony concerning one incident at some unspecified time in the past, in which she, as a nurse manager, sent an LPN home before the end of her shift falls short of establishing that the charging parties had such authority. It is not even clear that Miller administered discipline in this case. Moreover, the charging parties were never told they had authority to discipline employees, other than on paper, and never exercised such authority.

CONCLUSION OF LAW

I conclude that Respondent has not established that the charging parties were "supervisors" within the meaning of Section 2(11) of the Act. Therefore, Respondent violated Section 8(a)(1) in discharging them and disciplining them in the fall of 1996, as found by the Board in its 2000 decision.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

[4] Pursuant to *Oakwood Healthcare,* the party seeking to establish supervisory status does not have to prove that a putative supervisor may be held accountable for decisions made in assigning employees, whereas this is an element of establishing an individual's supervisory status on the basis of his or her ability to "responsibly direct" the work of others. It seems logical to this judge, that if one must be accountable for the direction of other individuals to be a "supervisor," they must also be held accountable for decisions made in assigning others. Thus, if a putative supervisor is subject to discipline for failing to assign a nurse with expertise in dialysis to a patient undergoing dialysis, it seems to me that this person ought to be deemed to be a supervisor and should not be deemed to be a "supervisor" if there are no consequences for his or her decisions in making assignments.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, Loyalhanna Health Care Associates, d/b/a Loyalhanna Care Center, Latrobe, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with the loss of their registered nursing licenses because they engage in protected concerted activities.

(b) Issuing disciplinary warnings to employees because they engage in protected concerted activities.

(c) Discharging employees because they engage in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, with interest.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Erica J. Lewis and Melanie M. Fritz, and the unlawful discharges of Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline and discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Latrobe, Pennsylvania facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 26, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 16, 2007

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of their nursing licenses for engaging in protected concerted activities.

WE WILL NOT warn or otherwise discipline employees for engaging in protected concerted activities.

WE WILL NOT discharge employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed employees by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, plus interest, in the manner set forth in the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warnings issued to Erica J. Lewis and Melanie M. Fritz, and to the unlawful discharges of Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz, and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary warnings and discharges will not be used against them in any way.

LOYALHANNA HEALTH CARE ASSOCIATES

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."